# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Question presented | 2 |
| Statement | 2 |
| Argument | 6 |
| Conclusion | 9 |


## CITATIONS


Case:

*Glasser* v. *United States*, 315 U. S. 60 ..... 5, 6, 8

Statute:

Section 2 (a) and (b) of the Bank Robbery Act of May 18, 1934, c. 304, 48 Stat. 783, as amended, 12 U. S. C. 588b (a) and (b) ..... 2




723853—46

# In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 637

WALTER MCDONALD, PETITIONER

*v.*

JAMES A. JOHNSTON, WARDEN, UNITED STATES PENITENTIARY, ALCATRAZ, CALIFORNIA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINIONS BELOW

The memorandum and order of the district court (R. 73–78) are reported at 62 F. Supp. 830. The opinion of the circuit court of appeals (R. 144–148) is not yet reported.

### JURISDICTION

The judgment of the circuit court of appeals was entered August 30, 1946 (R. 148–149). The petition for a writ of certiorari was filed October 23, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTION PRESENTED

The only question presented by the decision of the District Court on habeas corpus is whether petitioner's constitutional right to have the effective assistance of counsel for his defense was sufficiently protected by the trial judge under the circumstances of this case.

## STATEMENT

On January 25, 1939, petitioner and Otto Barnowski were convicted in the District Court for the Eastern District of Michigan after a trial by jury under a six-count indictment charging them with robbing the Farmington State Bank, a member bank of the Federal Reserve System and the deposits of which were insured by the Federal Deposit Insurance Corporation, and with putting in jeopardy the lives of several employees and officers of the bank, in violation of Section 2 (a) and (b) of the Bank Robbery Act of May 18, 1934, c. 304, 48 Stat. 783, as amended, 12 U. S. C. 588b (a) and (b) (R. 99–105, 106–107).[1] Each was sentenced generally to imprisonment for 35 years (R. 107–108, 111), subsequently reduced to 25 years.[2]

[1] Count 1 charged the robbery of the bank in violation of section 2 (a); the remaining counts each charged that in committing the robbery the life of a different named person was put in jeopardy by the use of dangerous weapons in violation of section 2 (b).

[2] Robbery of a bank in violation of section 2 (a) may be punished by imprisonment for not more than 20 years; a vio-

The present proceeding arose upon a petition for a writ of habeas corpus filed by petitioner in the District Court for the Northern District of California on June 13, 1945, in which petitioner sought his release from the custody of the respondent warden on the ground that he had been forced to trial in the criminal proceeding with assigned counsel with whom he had had differences. He alleged that he had been without funds to employ counsel and that the trial judge would not appoint counsel for him; that he thought that Curran, the attorney who appeared for him at the trial, had been appointed by the judge; that he requested Curran to withdraw, which Curran refused to do; that Curran had had no opportunity to prepare his defense, and asked for a continuance for that purpose, which the trial judge denied; that he asked the judge for "other and unprejudiced counsel," explaining that Curran "was awaiting trial before the grievance committee of the Michigan State Bar * * * for professional misconduct; and that petitioner was

lation of section 2 (b) may be punished by imprisonment for not less than 5 years nor more than 25 years. On October 21, 1943, petitioner's sentence was reduced by the convicting court to 25 years, a reduction which was upheld on appeal. See 139 F. 2d 939 (C. C. A. 6), certiorari denied, 322 U. S. 730. The validity of this reduction of sentence was again presented in a habeas corpus proceeding in 1944 in the Northern District of California. This petition was denied and the denial was sustained on appeal. See R. 89–92, 120–129; 149 F. 2d 768.

the prosecuting witness"; and that the judge denied this request, "compelling petitioner to proceed to trial with his personal enemy simulating a defender and without having made any preparation whatsoever for a defense" (R. 2–6, 68). Petitioner in support of his allegations annexed the depositions of the trial judge, the prosecuting attorney, and Curran, which had been introduced in a habeas corpus proceeding in the District of Kansas instituted by petitioner and Barnowski in 1941, and, in addition a letter from the State Bar of Michigan showing that petitioner had filed a complaint against Curran on November 19, 1938, and that the complaint had been heard on March 10, 1939, and dismissed (R. 6–68), subsequent to petitioner's conviction.

The district court issued an order to show cause (R. 68), and the respondent filed a return in which he alleged the denial of petitioner's application for a writ of habeas corpus made in the same court in 1944 (R. 69–70). Petitioner filed a traverse alleging that the denial of the earlier application had no relevance to the instant proceeding (R. 70-71).[3] The district court appointed counsel for petitioner (R. 72), and on September 20, 1945, handed down a "Memorandum and Order" denying the "motion to dismiss" and remanding petitioner to the custody of the United States Marshal

[3] As has been indicated in footnote 2, *supra*, pp. 2–3, this proceeding related only to the question of the validity of the reduction of petitioner's sentence.

for the Northern District of California, "to be returned to the United States District Court for the Eastern District of Michigan, Southern Division, for further proceedings on the said indictment" (R. 73-78). In its memorandum the district court stated that "Undisputed facts show that at the trial, after the jury had been impaneled, petitioner stated to the court that he had had a disagreement with his attorney. The court did not inquire into the nature of the disagreement. The facts further show that prior to the trial petitioner had filed a complaint with the State Bar of Michigan alleging that his attorney was guilty of violation of professional ethics. This complaint was thereafter heard on March 10, 1939 and dismissed" (R. 73); that "Here we have a layman charged with a serious crime who informs the court that he has had differences with his attorney. No inquiry is made by the court into the nature or seriousness of the differences, or whether or how these differences might affect the defense offered in behalf of the defendant. It seems clear that this case comes squarely within the holding in the Glasser case [*Glasser* v. *United States,* 315 U. S. 60, 71]. 'Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. * * * No such concern on the part of the trial court for the basic rights of (McDonald [petitioner]) Glasser is disclosed by the record before us.'" The court concluded that applying

the ruling in the *Glasser* case to the facts presented, petitioner has been "denied his constitutional right to assistance of counsel" (R. 77).[4]

On appeal by the respondent warden, the Circuit Court of Appeals reversed the order of the district court. It held that the *Glasser* case had no application to the facts presented and that the district court should have denied the petition for a writ of habeas corpus because it appeared from the petition itself that petitioner was not entitled to the writ.

## ARGUMENT

It is evident from an examination of the depositions of the trial judge, of Curran, petitioner's counsel, and of the prosecuting attorney, annexed to the petition for habeas corpus, that, as the district court stated in its memorandum opinion, the only undisputed facts were that petitioner, after the impaneling of the jury, stated to the trial

[4] The district court held that it was not foreclosed by earlier decisions of the Circuit Court of Appeals for the Tenth Circuit (113 F. 2d 984, certiorari denied, 311 U. S. 683; 129 F. 2d 196, certiorari denied, 317 U. S. 665) deciding petitioner did have the effective assistance of counsel; that the first case had been decided before the decision of this Court in *Glasser* v. *United States*, *supra*, and that while the second case was decided later, "there is no reference to it in the decision of the Circuit Court. It is probably that the attention of the Circuit Court was not called to the Glasser case or its decision would have been otherwise" (R. 74, 75–76).

The *Glasser* case was decided January 19, 1942. The first case in the Tenth Circuit was decided July 26, 1940; the second, June 17, 1942.

judge that he had had a disagreement with his attorney, Curran, that the trial judge did not inquire into the nature of the disagreement, and that there was then pending against Curran a complaint filed by petitioner with the State Bar of Michigan charging that Curran had been guilty of unprofessional conduct. Cf. the trial judge's deposition (R. 9) with those of Curran (R. 40), and the prosecuting attorney (R. 59). Hence, it is apparent that the only one of the differing versions of what had occurred which the district court accepted for the purposes of the petition was that contained in the deposition of the trial judge. That deposition states that Curran had not been assigned by the trial judge to represent petitioner, but had been retained by petitioner, and that although he was given opportunity to state the nature of his disagreement with Curran, petitioner failed to do so and did not request other counsel (R. 8–11). Indeed, the trial judge, in his deposition, stated that if petitioner had told "the real facts, * * * I would have excused the jury and made an investigation and if I had been satisfied that their difficulties were of such a nature that in my opinion the counsel could not proceed fairly, solely in the interest of the defense or defendants, I would have appointed other counsel, for them, had they shown their inability to procure counsel" (R. 12–13).

We think it is clear that there is no basis for the view of the district court that this case is con-

trolled by the decision of this Court in *Glasser* v. *United States,* 315 U. S. 60. In that case Glasser's retained attorney was assigned by the trial court also to represent Kretske, a co-defendant whose interests did not coincide with those of Glasser. The Court pointed out that "The possibility of the inconsistent interests of Glasser and Kretske was brought home to the court, but instead of jealously guarding Glasser's rights, the court may fairly be said to be responsible for creating a situation which resulted in the impairment of those rights." The Court concluded that this showed such a lack of solicitude on the part of the trial judge for the interests of Glasser as to result in the deprivation of his constitutional right to the effective assistance of counsel (p. 71).

The trial judge in this case has indicated that his failure to appoint new counsel was not the result of disrespect for the principle later embodied in the *Glasser* case. In the instant case, although given full opportunity, petitioner stated no facts to the trial court which would have led it to believe that there was such an irreconcilable difference between petitioner and his retained counsel as to make it improper for that counsel to continue in the case. Petitioner gave no indication then or at any time during the trial that he did not desire Curran to continue in the case because of his supposed grievance. It cannot, therefore, be said that the

trial judge in this case, as in the *Glasser* case, created a situation which might be said to have impaired petitioner's right to have effective representation. And there can be no doubt, as was indicated by the court below (R. 147), and as was held by the Circuit Court of Appeals for the Tenth Circuit in two prior habeas corpus proceedings instituted by petitioner (113 F. 2d 984 and 129 F. 2d 196), that petitioner's counsel did furnish him competent assistance at the trial.

## CONCLUSION

The *Glasser* decision affords no justification for the action of the district court in granting petitioner relief by way of habeas corpus. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

GEORGE T. WASHINGTON,
*Acting Solicitor General.*
THERON L. CAUDLE,
*Assistant Attorney General.*
ROBERT S. ERDAHL,
LEON ULMAN,
*Attorneys.*

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